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No. 80-689

In the Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, et al.,
Petitioners,

vs.

CLARK VINCENT, et al.,
Respondents.

MOTION OF BIBLE STUDY,
A Student Organization at the University of Missouri at St. Louis,
FOR LEAVE TO FILE BRIEF
AMICUS CURIAE
and
BRIEF IN SUPPORT OF RESPONDENTS

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May 29, 1981

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ISSUE PRESENTED

Whether the University of Missouri violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by denying student organizations the use of University facilities for religious teaching and worship when it provides facilities to student organizations for all other kinds of expression.

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No. 80-689

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MOTION OF BIBLE STUDY,
A Student Organization at the University of Missouri at St. Louis,
FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

Comes now BIBLE STUDY, a recognized student organization of the University of Missouri at St. Louis, and moves, pursuant to Supreme Court Rule 42, for leave to file the accompanying brief Amicus Curiae in support of Respondents.

Counsel for Amicus Curiae has obtained the consent of counsel for Respondents to file this brief. However, counsel for Petitioners has advised the undersigned counsel for Amicus Curiae that "it is the policy of our office

[Office of General Counsel, University of Missouri] not to consent to the filing of Amicus briefs in cases to which the University of Missouri is a party." Therefore, the Court's permission is hereby requested and required for the filing of the accompanying brief.

Bible Study, by leave of the Court of Appeals, filed a brief and a reply brief in the Court of Appeals for the Eighth Circuit's consideration of this matter. The Supreme Court of the United States granted Bible Study leave to file a brief Amicus Curiae in opposition to the University's Petition for Certiorari by Order dated February 23, 1981.

Bible Study is an officially recognized student organization at the University of Missouri at St. Louis. It was organized approximately five years ago. Although it is a religiously oriented student organization located on a University of Missouri campus, in contrast to Cornerstone, its activities consist almost entirely of reading the Bible and discussing interpretations of the chapters studied at each meeting. Bible Study is not affiliated with any particular religious faith nor does it discriminate against others because their particular religious faith or lack of a relgious faith. Their meetings focus on an analysis and interpretation of Bible passages in an effort to give meaning and direction to the lives of the participants.

After its request for meeting space was denied in 1978, Bible Study made repeated requests of the University and its Board of Curators for use of meeting rooms. As was their policy with respect to Cornerstone, the University denied meeting space for the regular meetings of Bible Study on the determination that a grant of space would violate the University's regulation No. 4.0314.0107.

On August 4, 1981, the Court of Appeals for the Eighth Circuit determined that regulation 4.0314.0107 is invalid. Shortly thereafter Bible Study renewed its request for

University facilities for weekly meetings for the academic year commencing in late August of 1980. In spite of the Court of Appeals' ruling invalidating the regulation, this request was denied on the grounds that the constitutionality of the regulation had not been finally determined.

On September 2, 1980, Bible Study advised the Board of Curators and the officers of the University that they were renewing their request for meeting space. They also advised the members of the Board by telegram that if consent for equal access to facilities were not granted, the organization was prepared to seek an injunction against the enforcement of the regulation. The Board of Curators determined that the regulation should be suspended pending final resolution of the issues in this case.

As specified in its Motion for Leave to File Brief in opposition to the Petition for Certiorari, Bible Study is immediately affected by the outcome of this case. It has been and is subject to the University regulation now under challenge by students at the University of Missouri-Kansas City.

Bible Study believes that its interests may not be adequately represented by individually named respondents of the University of Missouri-Kansas City. It therefore respectfully requests leave to file the accompanying Brief in support of Respondents within the appropriate time allowed for filing.

Respectfully submitted,

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May 29, 1981

BRIEF IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

Bible Study is an officially recognized student organization at the St. Louis campus of the University of Missouri. Over the course of the last several years, it has submitted requests for meeting space on campus which have been denied by the University. Bible Study has been advised that the regulation now under consideration by this Court compels denial of its request for meeting accommodations.

Bible Study encourages all interested persons, religious or non-religious, affiliated with a specific faith or not, to attend their weekly sessions to discuss Bible passages. Their meetings traditionally close with a prayer. If the University's onerous regulation is stricken, as sought herein, Bible Study would be free to invite speakers of national prominence to the St. Louis campus to address student groups on religious subjects.

The course of Bible Study's future will be profoundly affected by the outcome of this case. Their ability to maintain access and visibility to those who desire to learn about the Bible, whether for literary, historical, philosophical or religious purposes, will be implicated by this Court's ruling respecting this challenge to the University's prohibition of religious teaching and worshp.

SUMMARY OF ARGUMENT

Through its policy of extending meeting facilities to recognized student organizations, the University has created a public forum. The University has violated the

Fourteenth Amendment and the First Amendment by prohibiting student organizations from engaging in religious teaching and worship within that forum. In addition, their regulation unconditionally restricts expression solely on the basis of its content. It is well recognized that religious expression enjoys the same constitutional status as other expression.

The University has no compelling interest which would justify the restriction it seeks to impose on the First Amendment rights of students. The Establishment Clause does not require the prohibition of religious teaching and worship on campus. Moreover, the Establishment Clause requires the University's policy be rescinded in favor of a policy of neutrality which would accord the students the rights to which they are entitled and which would eliminate the University's entanglement with religion. The Missouri State Constitution does not warrant the restriction which the University has imposed.

ARGUMENT

In its review of the University's prohibition of religious teaching and worship in campus facilities, the Court of Appeals for the Eighth Circuit characterized this case as one which raises the fundamental issues of "freedom of religious expression and equal access to a public forum." *Chess v. Widmar*, 635 F.2d 1310, 1316 (8th Cir. 1980). Bible Study concurs that these basic constitutional principles control this controversy and further concurs with the Court's analysis and its conclusion that "[b]ecause of the burden it imposes on the rights guaranteed . . . by the First and Fourteenth Amendments of the federal Constitution, the regulation is invalid." *Id.* at 1320.

I. THE UNIVERSITY CANNOT ALLOW RECOGNIZED STUDENT ORGANIZATIONS TO MEET ON CAMPUS AND DENY ACCESS TO ONE GROUP SOLELY BECAUSE IT ENGAGES IN RELIGIOUS WORSHIP OR TEACHING.

Consistent with its role as a contemporary institution of higher learning, the University of Missouri has acknowledged the extra-curricular needs of students in its official Bulletin:

> **student activities**
>
> The student activities program is coordinated by the STUDENT ACTIVITIES OFFICE located in the University Center. Through various student organizations, boards and committees, cultural, social, educational and recreational programming is provided. The aim is to make student free time activity, a cooperative aid to academic study.
>
> In all its functions the student activities program encourages self-directed activity. This provides a great opportunity self-realization and individual growth while participating in programming for the entire student population or for a special interest group. The overall goal is to develop social and cultural awareness as well as intellectual curiosity. Students plan events and programs in such a way that they learn while working and find enjoyment at the same time.
>
> In extracurricular affairs, students govern themselves in accordance with the All Student Association (ASA) constitution. The legislative body is the Student Council, a representative group of students elected annually by the student body. The ASA recommends funding and acts as an advocate of student rights.

> Activities provide an excellent opportunity for all students to meet and work with the administration and faculty, as well as local community groups. Social and fiscal responsibility and leadership in our democratic society is a prime requirement for the educated individual. Student activities attempt to provide opportunity in these areas.
>
> Most activities and the ASA offices are housed in the University Center which is dedicated to serving the social, co-curricular and cultural needs of UMKC. Student programs in the University Center, often include lectures, symposia, concerts, discussions, receptions, chess and bridge tournaments, as well as many other special events sponsored by the ASA and its programming division, the University Program Council.

J.A. 37, Supplemental Stip., Exhibit 1.

Similarly, the University's dedication to the full development of students was confirmed in the administration's description of the student activity fee:

> CAMPUS WIDE PROGRAMS—The Intramural Sports Program, Communiversity, the *University News*, the University Program Board, the Cultural and entertainment activities of the University Program Board and the Student Services Commission, all represent programs which have campus-wide appeal and interest. In general, these types of programs span the distance between school council programs and those of ethnic and/or special interest groups. Without this segment of student programming being active and creative, the campus' social, cultural, entertaining, and service needs would go unmet.
>
> SPECIAL INTEREST GROUPS—Just as the University is responsive to the various educational needs of

> society, it must also be responsive to the various ethnic and nonacademic special interest groups within the University. The University has officially recognized over 90 active student organizations, each with its specific area of interest. Ethnic organizations, such as Jewish College Students, United Mexican American Students, and The Afro-American Student Union, focus on the issues and concerns of their particular ethnic heritage. There are political organizations, such as Young Socialist Alliance, Women's Union, Young Democrats, and so forth. Also, there is a broad spectrum of non-ethnic special interest groups such as the Fencing Club and Bridge and Chess Club, the Karate Club, Mortar Board, Omicron Delta Kappa, etc. These groups are formed by students to provide another dimension to the student's life on campus - the extra and co-curricular experience.

J.A. 37, Supplemental Stip., Exhibit 2.

In an effort to meet these "social, cocurricular and cultural needs," the University grants official recognition to student organizations at each campus. A benefit which accompanies official recognition is the use of University buildings and grounds for meetings. J.A. 26, Stip. ¶3.

Pursuant to this University policy, Cornerstone, and other student religious organizations, were granted access to facilities for their regular meetings until 1977. J.A. 26, Stip. ¶7.

The abrupt change in policy as applied to Cornerstone resulted from a review of the organization's activities[1] and

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1. Pursuant to a request from the University, Cornerstone explained that its meetings include the following activities:

1. The offering of prayer;

(Continued on following page)

a University determination that the content of their meetings contravened the Board of Curators' Regulation No. 4.0314.0107. J.A. 26, Stip. ¶7. The regulation provides:

> 4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for

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Footnote continued—

2. The singing of hyms in praise and thanksgiving;
3. The public reading of scripture;
4. The sharing of personal views and experience (in relation to God) by various persons;
5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and
6. An invitation to the interested to meet for a personal discussion.

As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere. There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect. J.A. 26, Stipulation of Facts, Exhibit C.

religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

A. The University Is a Public Forum.

The Court of Appeals identified the University's policy of extending meeting privileges to student organizations as one which "created an open forum for the activities of its recognized student groups." *Chess v. Widmar*, 635 F.2d at 1316. In recognizing the University campus as a public forum, the Court of Appeals followed long accepted case law which acknowledges the important role the First Amendment plays in an educational institution. *Papish v. University of Missouri Curators*, 410 U.S. 667 (1973); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). See also, *Spartacus, Etc. v. Board of Trustees of Illinois*, 502 F.Supp. 789 (N.D. Ill. 1980). Granted, the University retains the power to prescribe reasonable restrictions on the time, manner and place of expression within its public forum, but that power "does not lessen or negate its quality as a public forum." *Spartacus, Etc. v. Board of Trustees of Illinois*, 502 F.Supp. at 799.

Amicus recognizes that the primary function and character of a publicly-owned facility may preclude its qualification as a forum appropriate for the exercise of First Amendment freedoms. However, the circumstances which dictated this Court's determination that a jail, *Adderly v. Florida*, 385 U.S. 39 (1966), and a military installation,

Greer v. Spock, 424 U.S. 828 (1976), do not rise to the status of a public forum are not present in this case. The primary function historical use and activities of the University are far more closely aligned with the many facilities which have been recognized as public forums.[2] This conclusion is even more compelling in the case of a public university, such as the University of Missouri, which is committed to developing "social and cultural awareness, as well as an intellectual curiosity," and to providing an environment conducive to self-realization and growth. J.A. 37, Supplemental Stip., Exhibit 2.

B. The University's Regulation Is Unconstitutional Because It Has Been Applied to Deny Meeting Facilities to Selected Organizations Because of the Content of Their Meetings.

Having exercised its option in favor of creating a public forum, the University now must provide access to that forum on an equitable basis. *University of Missouri, Etc. v. Dalton*, 456 F.Supp. 985 (W.D. Mo. 1978); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); *Niemotko v. Maryland*, 340 U.S. 268 (1951). The University's efforts to condition any student organization's access to University buildings and grounds on a pledge that its members will refrain from religious expression defies the basic command of the First Amendment as explained in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972):

> "There is an 'equality of status in the field of ideas,' and the government must afford all points of view an equal opportunity to be heard. Once a forum is opened

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2. See, e.g., *Niemotko v. Maryland*, 340 U.S. 268 (1951) (City Park); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (Municipally-owned Theater); *Hague v. CIO*, 307 U.S. 496 (1939) (City's Streets & Parks).

> up to assembly or speaking by groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone."

See also, *Carey v. Brown,* ..... U.S. ....., 65 L.Ed.2d 263 (1980) and *Cohen v. California,* 403 U.S. 15 (1971).

The fact that all recognized student organizations are prohibited from engaging in religious worship and teaching in university-owned facilities does not cure the regulation's basic constitutional defect for "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison v. Public Serv. Comm'n,* ..... U.S. ....., 65 L.Ed.2d 319, 328 (1980).

Moreover this Court reaffirmed the Constitution's abhorrence of content-based restrictions on speech less than one year ago. *Carey v. Brown,* supra, reminded us all that "the desire to favor one form of speech over all others—is illegitimate." 65 L.Ed.2d at 274.

This Court, on a previous occasion, instructed the University of Missouri, that:

> ". . . the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, . . ." *Papish v. University of Missouri Curators,* supra, at 671.

In the face of this consistent denunciation of "content-based" restrictions the University has imposed an official preference for non-religious speech. It has adopted and enforced a blanket prohibition against any expression

containing religious teaching or worship. Clearly this regulation contravenes the basic constitutional principle on which this case turns, for

> ". . . above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept. v. Mosley,* 408 U.S. at 92.

The University's constitutionally infirm, content-based restriction has resulted in disparate treatment of similarly situated student organizations. This violates the First and the Fourteenth Amendments.

C. Religious Expression Is Protected by the Speech Clause of the First Amendment.

Petitioners have expressed concern about the appropriate constitutional position of "religious speech" and have argued that "[i]t is still 'speech' and such speech should not be given any greater protection because it happens to be about a religious subject." Petitioner's Brief at 27, 28. Amicus wholeheartedly concurs that religious expression is not entitled to any greater constitutional protection than speech addressing politics, tax reform, abortion, civil rights, or capital punishment. But neither should religious expression be afforded any lesser constitutional protection, as this regulation requires. *NAACP v. Alabama,* 357 U.S. 449 (1958) confirms the equal status which "political, economic, *religious* and cultural matters," enjoy under the First Amendment. Id. at 460. (Emphasis added).

Petitioners contend that the religious content of the expression it seeks to restrict takes it out of the protection of the speech clause. Petitioner's Brief at 27. This Court

has never found that religious expression enjoys a lesser constitutional status than other kinds of expression. On the contrary, this Court's rulings in *Fowler v. Rhode Island*, 345 U.S. 67 (1953) and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), compelled the Court of Appeals to conclude ". . . that religious speech, like other speech, is protected by the First Amendment." *Chess v. Widmar*, 635 F.2d at 1315. See also, *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Other courts throughout the country have recognized the equal status of religious expression in a public forum.[3]

II. NEITHER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT NOR THE MISSOURI CONSTITUTION JUSTIFIES THE UNIVERSITY'S PROHIBITION OF RELIGIOUS TEACHING OR WORSHIP.

University officials have attempted to defend their regulatory abridgement of the students' First and Fourteenth Amendment rights with the argument that religious expression in University facilities would violate the Establishment Clause of the United States Constitution and of the Constitution of the State of Missouri. The Court of Appeals rejected this contention and concluded that the regulation imposed by the University not only was not required by the Establishment Clause, but that the regula-

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3. See, e.g., *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263, 270 (7th Cir. 1978) (sale of religious literature in Chicago airports); *International Society for Krishna Consciousness, Inc. v. Englehardt*, 425 F.Supp. 176 (W.D. Mo. 1977) (distribution of religious literature at Kansas City International Airport); *Swearson v. Myers*, 455 F.Supp. 88, 91 (D. Kan. 1978) (distribution of literature and solicitation of funds); *Hall v. McNamara*, 456 F.Supp. 245, 246 (N.D. Cal. 1978) (city permit requirements for distribution of literature or solicitation of funds); *International Society for Krishna Consciousness, Inc. v. Walke*, 453 F.Supp. 869 (E.D. Wisc. 1978) (distribution of literature in Milwaukee airport).

tion itself contravened the prohibition against governmental establishment of religion. *Chess v. Widmar*, 635 F.2d at 1317.

In reaching its conclusion, the Court of Appeals applied the test fashioned by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1970).[4] Under this test, the governmental enactment under scrutiny

> ". . . First, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive entanglement with religion." 413 U.S. at 773.

The District Court found, and the Court of Appeals agreed, that permitting Cornerstone to meet on campus would reflect a secular purpose in that it would aid all student groups without regard to religion and that elimination of the distinction among student organizations would completely avoid any government entanglement with religion. *Chess v. Widmar*, 480 F.Supp. 907, 914 (1979), *Chess v. Widmar*, 635 F.2d at 1317. The trial and appellate courts disagreed, however, on the District Court's finding that allowing religious teaching or worship on University campuses would have the primary effect of advancing religion. *Chess v. Widmar*, 635 F.2d at 1317.

The Court of Appeals explained its evaluation of a neutral policy as follows:

> "We cannot agree, however, that such a policy would have the primary effect of advancing religion. Rather,

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4. This Court has consistently applied the three-pronged test to review establishment clause up to and including: *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, reh. denied, 445 U.S. 972 (1980) and *Thomas v. Indiana Employment Security Division Review Board*, 49 U.S.L.W. 4341 (April 7, 1971); *Stone v. Graham*, ... U.S. ....., 66 L.Ed.2d 199 (1980).

it would have the primary effect of advancing the University's admittedly secular purpose—to develop students' 'social and cultural awareness as well as their intellectual curiosity.' It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular. *It would no more commit the University, its Administration or its faculty to religious goals than they are now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, the Young Democrats or the Women's Union.*" Id. (Emphasis added.)

Moreover, Bible Study submits that unless the University concedes that provision of meeting accommodations signifies the institution's support and approval of Gay Lib's advocacy of homosexuality as a way of life and the National Education Association's commitment to collective bargaining, *Gay Lib v. University of Missouri*, supra, *University of Missouri, Etc. v. Dalton*, supra, it cannot maintain that the extension of similar meeting privileges signals sponsorship, support and approval of Cornerstone. Cornerstone does not seek the University's imprimatur, nor its power, prestige and influence. It simply seeks the same degree of neutrality accorded other groups. Cornerstone is constitutionally entitled to no more and no less. *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976).

When Pope John Paul visited the United States, Madalyn Murray O'Hair challenged his use of the National Mall for Mass on the ground that such use would signal government approval and establishment of religion. However, the United States Court of Appeals for the District of Columbia Circuit rejected this rationale. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979). Noting that the Department of Interior treated all religious and non-religious groups

alike in providing use of the Mall, the court determined that the holding of the scheduled church service

> ". . . implies no more approval for this Church than for any other group using the Mall. The message that it does send to the world is approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion." Id. at 936.

The Court went on to warn against confusing the required neutrality with hostility and concluded that the challenged $128,450 to $178,450 expended by the Park Service for services similar to those expenses incurred with any large gathering on the Mall constituted "accommodation in furtherance of the spirit and purpose of the First Amendment." Id. at 937.

Amicus urges this Court to apply *O'Hair v. Andrus* and, thus, replace the hostility generated by the University's regulation with the neutrality and accommodation to which the students are constitutionally entitled.[5]

Bible Study also submits that the University is incorrect in its contention that providing equal access to University facilities for religious teaching and worship would constitute support of religion. It is well recognized that an absolute "hermetic separation" between government and religion is impossible. *Roemer v. Maryland Public Works Bd.*, supra. Furthermore, as Justice Blackmun observed in *Roemer*: "[R]eligious institutions need not be

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5. As recognized by the Court of Appeals for the Third Circuit, a second challenge to public expenditures occasioned by the Pope's visit, *Gilfallan v. City of Philadelphia*, 637 F.2d 924 at 933 (3rd Cir. 1980), cert. denied, 49 U.S.L.W. 3864 (May 19, 1981), must be distinguished from *O'Hair v. Andrus* and *Chess v. Widmar*, because the plaintiffs in the Philadelphia case agreed that the Pope had a right to use the publicly owned Logan Circle. Their suit challenged only the extraordinary expenditures made to build a special altar to be used only for the Pope's Mass.

guarantined from public benefits that are neutrally available to all." Id. at 746.

The University has contended that provision of the facilities sought by Cornerstone would violate the principle established by this Court in *Tilton v. Richardson*, 403 U.S. 672 (1970). In *Tilton*, this Court reviewed the constitutionality of public funding for the construction of classrooms at church-related colleges. Under the grant, the prohibition against using the facilities constructed with public monies for sectarian activities would expire 20 years after completion. The court recognized that the provision of funds for construction of a building would contribute a substantial value to church-related institutions. Regardless of this recognition, however, the entire program was not invalidated in *Tilton*. Rather, only that portion of the law which permitted restrictions on religious use to expire after 20 years was struck down.

The facts presented by this case are entirely different than those considered by this court in *Tilton*. Therein, a religious body would have gained exclusive control of government-financed buildings. After expiration of the 20 year limitation, the religious organizations would have every right to devote the building exclusively to religious use. Contrary to *Tilton*, Cornerstone is not expecting the University of Missouri to relinquish control of any facility. It simply seeks access equal to that accorded to other groups for purposes of association, communication and study.

A. The Establishment Clause Requires Reversal of the University's Policy.

Not only would a policy granting neutrality to student religious organizations comport with the constitution's requirement of separation, the clause itself requires such a

change in policy. The Court of Appeals determined that the regulation adopted in the name of the Establishment Clause failed the traditional test. Contrary to the University's contention that neutrality would have the primary effect of advancing religion, the Court of Appeals determined that the regulation contravened that Establishment Clause because its primary effect is the inhibition of religion. *Chess v. Widmar*, 635 F.2d at 1317. Such inhibition is the natural consequence of the University's expulsion of religion from the campus. The students' interest in a central place within the arena of communications goes far beyond a matter of convenience. Contrary to the University's argument, the importance of a central, on-campus meeting facility should not be lightly dismissed. *Healy v. James*, 408 U.S. 169 (1972).

Amicus also submits that the University regulation, on its face, requires excessive entanglement with religion in violation of the Establishment Clause. The third-prong of the Establishment Clause test clearly addresses the fact that:

> "The prospect of church and state litigating about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment. . ." *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977).

The record shows that Cornerstone conceded that it would engage in religious teaching and worship, but that does not eliminate the University's difficult task of determining what constitutes "religious" teaching or worship with respect to meeting requests submitted by other organizations. How much monitoring, probing and interpretation will the University's regulation require with organizations who will not concede the religious content of their meetings? Which University official is prepared

to attend open meetings on abortion or capital punishment to determine whether comments addressing the moral aspects of such controversial topics must be censored by the University as a violation of their prohibition of religious teaching or worship? Furthermore, how will she decide, for the regulation itself offers no guidance to the decision-maker who must determine what is "religious"?

In contrast to the necessary entanglement required by the existing regulations, a policy of neutrality would totally eliminate any involvement of the University with religion. If the University were to adopt a policy of neutrality, as requested by Cornerstone, there would be no need for it to be concerned with whether the interaction of Cornerstone on campus advanced or inhibited religious beliefs among students or had no impact either way, for the students would be free and responsible for the exchange of their ideas independent of University censorship. The University could entirely ignore religion. In fact, the University would never have occasion to know the results of interaction among voluntary associations of students.

B. The State Constitution Does Not Compel Infringement of Federal Constitutional Rights.

The University also cites the state's compelling interest in strict separation of church and state, as reflected by the state constitution as justification for enforcement of its regulation. Amicus shares the Court of Appeals' reaction to this argument as set out in Note 7:

> "Moreover it is difficult to believe that the University is as concerned with the strict separation of church and state as it here contends. The regulation at issue specifically states that the ban on the use of University facilities for religious worship or teaching is not to

> be interpreted 'to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities.' Regulation No. 4.0314.0107. This exception creates a greater danger of placing the University's imprimatur on religion than would granting Cornerstone's request for a meeting place." *Chess v. Widmar*, 635 F.2d at 1316.

It should also be noted that the University has allowed construction and use of a chapel on the University's main campus. Regulation No. 4.0314.0108., J.A. 26, Stipulation ¶10. It would appear that the Board of Curators use the Constitution as convenient to support their own personal preferences regarding who will be allowed to pray at the University and what expression will be allowed among recognized student organizations.

Assuming, however, that the University is sincere and correct in its interpretation that the Missouri Constitution requires a higher degree of separation of church and state than the federal establishment clause, Bible Study submits that the state constitutional provision cannot be legitimately used to defeat the students' federal constitutional rights.

The decisions cited by the University which apply the state constitutional provisions requiring separation of church and state do not preclude religious teaching and worship at the University of Missouri. *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1942), and *Berghorn v. Reorganized School District No. 8*, 260 S.W.2d 573 (Mo. 1953), both addressed situations in which formerly sectarian elementary schools were permeated with religious instructors, curricula, and symbols even after they were taken into the state system as public schools. *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), cert. denied, 419 U.S. 1111 (1975),

addressed the practice of loaning school textbooks to students and teachers in sectarian elementary and secondary schools. *Special Dist. for Education and Training of Handicapped Children v. Wheeler,* 408 S.W.2d 60 (Mo. 1966) concerned the use of public special education teachers who were working in sectarian schools with elementary and secondary students. Therefore, these cases are inapposite and factually distinguishable.

The degree of separation warranted by the susceptibility of impressionable school children simply cannot be applied with respect to the voluntary association of more mature students who are not compelled by law to attend school as were the children in schools examined in the foregoing cases. The Supreme Court of Missouri recognized this important distinction as it upheld state funded tuition grants to students attending private colleges and universities. In *Americans United v. Rogers,* 538 S.W.2d 711 (Mo. 1976), cert. denied, 429 U.S. 1029 the state's highest court explained:

> "In doing so, we take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: 'Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background and students.' " Id. at 722.

If the tuition grants, which were based in part on need and which enabled Missouri students to receive support to attend sectarian colleges and universities, do not offend Missouri's interest in separation of church and state,

surely equal access to the University's facilities for the exercise of First Amendment rights will not compromise the state constitution. This is borne out by the experience of the University when meetings of Cornerstone and other student religious organizations were allowed in campus facilities. Their presence threatened neither the state of Missouri nor its constitution.

The University's exception for prayer at public functions, its tolerance of worship at a university chapel and the Missouri Supreme Court's holding in *Americans United v. Rogers*, supra, clearly reveal the fallacy of the argument that the Missouri Constitution requires the impossible, i.e., total and complete elimination of religion from secular life. If the University continues to maintain that the State's interest requires expulsion of religious expression from campus, it must revise its regulation to proscribe prayer at public functions and religious activities in the University's chapel.

CONCLUSION

For the foregoing reasons Amicus Bible Study respectfully urges this Court to affirm the Court of Appeals for the Eighth Circuit's ruling in *Chess v. Widmar*.

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